IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 252

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR, APPELLANT,

versus

SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER APPELLEES.

On Appeal from the Supreme Court of the State of Louisiana.

BRIEF OF AMICI CURIAE

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BRIEF OF AMICI CURIAE

INTRODUCTION

The undersigned members of the Bar of the States of Louisiana, Texas, Washington, California, Idaho and Arizona, having obtained the written consent of the parties to this proceeding so to do, in accordance with Rule 27, (9) of this Court, file this brief as *amici curiae*. They do so because of the probable effect of the decision in this cause upon the application of the 1942 amendment of

the Federal Estate Tax Act (as hereinafter set out) with reference to the interest in marital community partnership property held as such by a "decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country".

There are eight states in this country where the existing system of community property referred to is "traditional", to-wit: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. That system was a part of the fundamental law of the "Mother Countries" of most if not all of these states. For example, the State of Texas carried forward the system adopted by the Republic of Texas from the laws of Spain and Mexico; the State of Louisiana carried forward the system based on the laws of France and Spain; and most of the other states and territories were formed out of the area acquired from Mexico by the Treaty of Guadalupe Hidalgo and carried forward the system based on the laws of Spain or France. It is presumed that the reference in the Statute to the community property law of "any foreign country" pertains primarily to "Mother Countries". Two other states contiguous to one or more of these states have since adopted the community partnership property system in whole or in part, to-wit, the States of Oklahoma and Oregon. However, the attorneys filing this brief as *amici curiae* are only authorized to appear in behalf of the public interest existing in the traditional community partnership property states, and act in that capacity as reflected at the close of this brief.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana (R. 19-30) is reported at 14 So. (2d) 475. The District

Court rendered no formal opinion. The judgment of that Court appears at Record 13.

JURISDICTION

The opinion and judgment of the Supreme Court of Louisiana were entered June 21, 1943 (R. 19-30). Motion for Rehearing was denied July 13, 1943 (R. 30-31). Order allowing appeal was entered July 17, 1943 (R. 33), and the record was filed in this Court on August 9, 1943. Jurisdiction vests in this Court by virtue of 28 U.S.C. § 344 (b) or if the contention of the Attorney General of the United States below were correct, the case is reviewable by *certiorari* (28 U.S.C. § 344 (b) and such review would be had "under the papers whereon the appeal was allowed" (28 U.S.C. § 344 (c)).

QUESTION REPRESENTED

Section 402 (b) of the Revenue Act of 1942, which amended **Section 811 (e)** of the Internal Revenue Code, added the following new provision to the Estate Tax Law, requiring for the first time that there be included in a decedent's gross estate:

> "(2) Community interest.—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

The question presented is the validity of this amendment to the extent that it requires the estate tax due by a decedent to be measured, in whole or in part, by the value of the interest of the surviving spouse in community partnership property.

The brief filed in this case by the United States as *amicus curiae*, while the case was pending in the Supreme Court of Louisiana, summarizes the matter at page 18 thereof as follows:

> "The constitutional question is whether Congress can assess a tax against a decedent's estate measured by the full value of the community property (with the statutory exclusion) in light of the fact that prior to the death the surviving spouse had a 'vested', undivided community property half-interest therein."

STATUTES INVOLVED

The pertinent Federal Statutes and State Statutes are included in the Appendix, pp 1 to 16 *infra.*

STATEMENT

Sam Wiener, Jr. died December 19, 1942, after the effective date of the aforesaid amendment. He and his wife were residents and citizens of Louisiana and were married in Louisiana. He was survived by his wife, to whom he had been married on February 12, 1907, and four children. At the date of his death, he and his surviving wife were possessed of a community estate valued, after debts, succession charges and taxes, at more than $600,000. He bequeathed his one-half interest in this property to three of his children as universal legatees. (R. 10, 11).

In an appropriate proceeding in the First Judicial District Court of Louisiana, Parish of Caddo, to fix the inheritance taxes due the State of Louisiana, by virtue

of Act No. 119 of the Legislature of Louisiana for the year 1932,[1] (the ordinary "take up" statute in force in most States by which the inheritance taxes due the State are fixed at a minimum of 80% of the basic federal tax), the Appellant, in his official capacity as tax collector, contended that, since the aforesaid Section 402 (b) of the Revenue Act of 1942 required all of the community property to be included in the gross estate of the decedent, the basic federal estate tax was accordingly increased, and, therefore, the 80% thereof levied by the State statute was increased, with the result that there was, as Appellant contended, $14,330.90 due the State of Louisiana, rather than $8,224.09 which would have been due if the basic federal estate tax had not been measured by the total community estate (R. 8, 11- 12).

The universal legatees responded that the aforesaid amendment violated the Due Process Clause of the Fifth Amendment to the Constitution of the United States, and Section 8 of Article I of the Constitution (R. 9). The District Court upheld this contention (R. 13). On appeal to the Supreme Court of Louisiana an amended plea of unconstitutionality was filed to meet the point raised by the Attorney General of the United States, who appeared as *amicus curiae* in the Supreme Court of Louisiana; this point being that the tax liability in issue was only that imposed by the State statute. The amended plea was to the effect that viewed from that aspect, the State statute either alone or in conjunction with the Federal statute violated the Fourteenth Amendment to the Constitution of the United States. (R. 17).

The Supreme Court of Louisiana affirmed the decision of the District Court, holding that the Federal Statute violated the Due Process Clause of the Fifth

[1]Appendix p 11, *infra*

Amendment and that, if the matter be considered as State action, the Fourteenth Amendment to the Constitution was violated. (R. 19-30).

The Tax Collector duly appealed to this Court (R. 31-33).

It is obvious that the decision of this Court on the question presented will have a most important bearing upon the application of Section 402 (b) of the Revenue Act of 1942, and the "take up" Statutes in all Community Property States,[1-a] to the citizens of those States, and Estates therein situated. This, we respectfully submit, justifies the submission of this brief upon behalf of those so interested and so to be affected by the holding in this case.

SUMMARY OF ARGUMENT

Section 402 (b) of the Revenue Act of 1942, (amending **Sec. 811 (e)** of the Internal Revenue Code) provides that all property held by a decedent and spouse in community shall be included in the gross estate of the decedent, except that portion shown to have been received as compensation for personal services actually rendered by the survivor, or derived from such compensation, or from the separate property of the survivor, but in no case less than the share over which the decedent had the power of testamentary disposition. This statute violates the Due Process and Uniformity Clauses of the Constitution, and is, therefore, invalid, because:

1. Community partnership property, the bulk of which frequently comes from sources other than the

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[1-a] These "take up" Statutes are very much alike. The Louisiana Statute is set out in the Appendix, p 11 *infra*; the Taxes Statute is Ch. 5 A, Art. 7144 a, Revised Civil Statutes of Texas, as amended by Acts of 1933, 43rd Legislature, p. 581, Ch. 192, Para. 2b. The Washington Statute is Sec. 11202 B of Remington's Revised Statutes of Washington, edition of 1933; the California Statute is California Inheritance Tax Act of 1935, Section 2, Subsection (12), etc.

income from separate property of either spouse or compensation for personal services actually rendered by either spouse, is, from the moment of acquisition and regardless of the method of acquisition, owned jointly and equally by the spouses, neither deriving title from the other. This ownership is real, practical, full and complete, including both present ownership and full power of testamentary disposition—not diminished by the powers of management which varying local laws place in one or the other spouse, and which may be changed as frequently as local authorities see fit. Prior to the 1942 amendment, this ownership of community partnership property was recognized by the United States Government and all of its departments as the controlling factor in determining the property included in a decedent's gross estate,—as it was as to all property in non-community property States,—so that one-half of all community partnership property was included in the gross estate of the first spouse to die, and the other one-half in the gross estate of the second to die.

Under the express terms of the amendment, the test of ownership is abolished,—as to community partnership property only,—and there is substituted, as to the bulk of such property, the conception of dual, but complete, ownership by both spouses, so that this bulk is taxed as a part of the gross estate of the first to die, depending not on source, actual ownership or management, but upon the sheer accident of which spouse predeceases the other. As to some property (compensation and derivatives from separate property), the source controls if, and only if, the first to die received the compensation or owned the separate property, and requires all such property to be included in such recipient's gross estate. If the first decedent did not receive the compensation or the derivatives from separate property,

source is disregarded, and one-half is included in the gross estate of such decedent. Power of testamentary disposition limits the minimum amount to be included in the gross estate, so it can not be less than the amount over which the decedent had power of testamentary disposition (one-half); but it does not control for, in most cases, property over which the decedent had no power of testamentary disposition is included in his or her gross estate. A shifting of management is not made determinative, for frequently property never managed by the decedent is included in his or her gross estate.

The "prior taxed property" statutes not being applicable, one-half of the community must be included in the gross estate of the surviving spouse, upon his or her death, without regard to the time elapsed since the same property was taxed as a part of the gross estate of the first decedent. Only one-half of community debts can be deducted in arriving at the net estate, though all community assets are included in the gross estate. There are numerous other instances of arbitrary and capricious action resulting in gross discrimination and, frequently, in the confiscation of the entire estate.

2. This method of taxing community property is so capricious, arbitrary, discriminatory and confiscatory as to violate the Due Process Clause of the Fifth Amendment. If the present case be considered as an exertion of State power, it violates the Due Process Clause of the Fourteenth Amendment. It is a plain example of measuring the tax imposed upon A by the value of B's property. This Court has condemned such a system as violating the Due Process Clauses of both the Fifth and Fourteenth Amendments of the Constitution of the United States.

3. Neither the **Tyler** nor **Jacobs** cases, nor any other decisions of this Court, support the statute, as so

amended, or justify a holding that it is valid. They could not support such a statute for Congress has never before attempted to measure an estate tax by the value of property which the decedent did not own at death or of which he had never made a disposition, donative or testamentary in character, or had power to make such disposition under a general power of appointment. The heart of the cases as well as the statute, dealing with tenancies by the entirety and joint tenancies, is that the property included in a decedent's gross estate originally belonged to him and passed from him to one who survived him by an act donative or testamentary in character. This theory is never applicable to community partnership property. Neither spouse derives ownership, gratuitously or otherwise, from the other.

4. This method of taxing community property also violates the geographic uniformity requirement of Article I, Section 8, of the Constitution of the United States, in that objects are taxed in community property States when the same objects are not taxed in other States. The amendment is directly and expressly aimed at the territory composed of States having a marital community property system. Whether the factors controlling the incidence of the tax be considered as the termination of the marriage relation by death, a shifting of control occasioned by death, the passage of property by death, or an increase in a living person's economic rights occasioned by the death of another; the same factors do not control in non-community states. The effect of the death of a partner, managing or otherwise, of a trustee, executor, general agent or guardian, as well as the statutory method of taxing estates by the entirety and joint-tenancies, sufficiently illustrate the utter disregard of geographic uniformity required by the statute, as amended.

A committee of Congress, in recommending the amendment, declared that they were moved by a so-called tax advantage in favor of community partnership property States under the established system. There is no basis for this charge. Taxes are usually, if not necessarily, imposed upon, or measured by, the property of the taxpayer, not that owned by another. Ownership must be determined by the practical substantial rights afforded by State law. Community partnership property met that test in this Court many years ago. It is not within the competency of the Congress to vary these rights or to establish, or even favor, a marital property system uniform and nation-wide in scope. To recognize actual, substantial ownership in determining the incidence of a tax can never be discriminatory. Each system has compensating burdens and benefits. But to recognize ownership in some States and to tax by no standard, other than caprice, whim or accident in others, contrary to established rules of property and to established presumptions, will produce a total lack of geographic uniformity, as well as the grossest confusion and discrimination, violating the fundamental concepts of the Constitution and our system of power divided between the Nation and the States.

ARGUMENT

I.

In demonstrating the invalidity of the Federal Statute here in question (Sec. 402 (b) of the Revenue Act of 1942), we desire briefly to review the sources and nature of community partnership property in Louisiana (and the other Community Partnership Property States); and then analyze the statute itself. When the statute is considered against the background of the community partnership systems to which it is addressed, its arb-

trary, capricious and discriminatory character becomes apparent.

Sources of Community Partnership Property

The record reveals only that Wiener was married in 1907 and that the property used to measure the tax here involved was all of the commmunity partnership property acquired during the existence of the marriage which his death terminated, and owned by him and his wife at death. Nothing is shown as to his business activities. It is necessary, therefore, to resort to the statutory definition of "community partnership property" to determine from what sources this property could have been acquired.

In Louisiana, all property found in the possession of either spouse upon dissolution of the marriage is presumed to be community partnership property, unless it can be clearly identified as belonging to the separate estate of one or the other. (Louisiana Civil Code, Art. 2405, Appendix 13, *infra.*) The separate estate of either spouse is that property which that spouse owned at marriage or thereafter acquired by gift, devise, or inheritance. Revenues from separate property, as a general rule, fall into the community partnership (Louisiana Civil Code, Articles 2402, 2599, 2406, 2404, 2385, 2386, Appendix pp 13, 14; *infra.*) Property once separate can lose that separate character and become commmunity partnership property through commingling; the community is the favored estate and everything not identifiable as separate property falls therein, regardless of its method of acquisition.

Therefore, the property used to measure the tax in this case must have come from one, or more, or all, of the following sources:

(a) Savings from compensation received for the husband's personal services;

(b) Savings from compensation received for the wife's personal services;

(c) Savings from revenues of the wife's separate estate;

(d) Savings from revenues of the husband's separate estate;

(e) Profits from gainful occupation where neither spouse nor minor children received compensation for services actually rendered, such as farming, ranching, merchandising, manufacturing, etc.;

(f) Property purchased during marriage on credit or with borrowed funds;

(g) Property acquired with commingled or unidentified property or with joint funds;

(h) Miscellaneous sources, as, for example, property acquired with savings from compensation received for the personal services of minor children, or property acquired by adverse possession, and similar acquisitions;

(i) Profits from reinvestment of property or funds received from sources (a) to (h) inclusive.

The parties here were married for some thirty-four years (R. 10, 11). Never before the amendment of 1942 now in question had there been necessity of husband and wife keeping records showing the source of funds used to acquire community property and the investment, from time to time, of the revenues of community partnership property. Therefore, in the generality of cases and, undoubtedly, in this case, it is impossible, upon the death of the spouse most familiar with the business transactions, for his executor or legatee to trace all of the transactions of a long married life and determine through many muta-

tions and changes the origin of each particular community asset on hand at death.

Nature of Community Partnership Property

The nature of community partnership property is well known to this Court. It was summarized by this Court in *Bender v. Pfaff*, 282 U. S. 127; and also by the highest Court of Louisiana in its opinion in this case. That opinion is controlling as to the interest owned by the husband and the surviving spouse at the time of his death and as to the rights which terminated at the husband's death. As detailed in that opinion, the property rights of the surviving wife in the community partnership property may be summarized as follows:

1. The wife is an equal owner with her husband in all of the community partnership property. The wife's rights, interest and title are equal to the husband's and are of equal dignity.

2. The wife does not take her title through or under the husband; he never owned any interest in her portion of the property, inasmuch as she acquired it by onerous title at the very moment of its acquisition by the community partnership and she continued uninterruptedly to hold such title so long as the property remained an asset of the community.

3. The husband owned no interest in the wife's portion of the property which terminated with his death. Her portion of the property is not subject to the payment of his debts and he can not and did not dispose of it by Will. Upon his death his one-half passes to his heirs or legatees; she simply retains the equal interest in the property which she owned as co-owner prior to her husband's death.

4. The relationship is analogous to a commercial partnership in which the husband and wife are equal half

partners. The husband, invested with management by the contract of the partners and by statute, stands in the same category as a contractual managing partner. The rights of the husband and wife spring "from an express legal contract of partnership entered into at the time of the marriage."

5. The wife enjoys full power of testamentary disposition over her half interest in the property. She can will it to whom she choses, even to her paramour, and her husband is powerless to prevent it.

6. At her death without a Will her interest passes to her heirs at law, even though those heirs be illegitimate children by another man, and her husband is powerless to prevent this.

7. If the husband proves a bad or incompetent manager she has the right to a partition of the community property and the delivery to her of her half interest.

8. If the husband, as fiduciary and managing partner, is guilty of fraud, she likewise has the right to a liquidation of the partnership and a partition of the property and the delivery to her of her half interest.

9. In the case of a legal separation without divorce, she again has the right to a liquidation of the partnership and a partition and the delivery to her of her half interest.

10. In the case of a divorce, she has the right to her one-half interest even though she be guilty of the grossest sort of misconduct, such as adultery, and the Court is powerless to deliver to her any less than her full one-half interest.

11. Her half interest is subject to the payment of her one-half of the community debts incurred during the existence of the partnership.

12. She is liable for income taxes on the property which represents her one-half of the partnership income.

13. At her death her legatees or heirs are liable for Louisiana Inheritance Taxes for the privilege of receiving her half interest in the property.

14. At her death her estate prior to the 1942 amendment was liable for Federal Estate Taxes imposed on the privilege of transmitting her half interest in the partnership property at death.

It is clear, therefore, that, in Louisiana, the wife is the full, equal co-owner with her husband of the community partnership assets. Her husband's interest as managing partner is not a beneficial interest. He is merely the managing partner of the partnership, but his powers of management are restricted and circumscribed. He cannot use the property for the improvement of his separate estate or to pay his separate debts. While he may invest and reinvest the proceeds of any sale, any property so acquired immediately becomes community partnership property in which his wife possesses a full one-half interest. His management of her interest in the property terminates upon separation, upon divorce, upon a show of fraud, or even upon a show of bad or incompetent management. Moreover, the husband becomes the managing partner in the first instance by virtue of the marriage contract. Under the statutes of Louisiana, the wife can, by an ante-nuptial agreement with her husband, stipulate that there shall be no community, or by agreement make herhelf, rather than him, the managing partner,[1b] or

[1b] In some States, for example, Texas, a certain class of community property, to wit, the wife's earnings, the income from her separate property, and property acquired with such earnings or income are administered by the wife as the managing partner. *In re Gutierrez*, 33 Fed. (2d) 987 (S. D. Texas). Similarly, if a husband becomes insane or abandons his wife, she becomes the managing partner as to all community property.

agree that the community partnership shall be managed jointly by husband and wife or vary the partnership agreement in any other way they see fit. Louisiana Civil Code, Articles 2399, 2329, 2325, 2392, App. pp. 15, 16 *infra*; *Desobry v. Schlater* 25 La. Ann. 1425.

The above summary clearly shows that the wife in Louisiana is the actual owner of a full one-half undivided interest in the community partnership property, possessed of all of the legal incidents of ownership. The limited, safeguarded and permissive management granted to her husband is as a managing partner; is that of a fiduciary and is limited both in scope and duration. The wife possesses the entire bundle of rights that go to make up actual ownership of property. The husband possesses only limited managing powers as agent, managing partner or trustee for his wife.[2]

Prior to the Estate Tax Amendment accomplished by the Revenue Act of 1942, the Estate Tax was applied to Community Partnership Property in the same way that it was to all other property;—the tax was measured by the value of the property which passed by reason of the death of the decedent. In no case was the tax measured by property which the decedent did not own at death, and which he had never owned. Under this system, since each spouse in a Community Partnership Property State owns one-half of the Community Partnership Estate, and the survivor's one-half is not derived from and had never been owned by the decedent, the tax imposed upon the estate of the first to die, whether husband or wife, was

[2]Rules in the other several community property states are substantially the same with some minor variations. See *Poe v. Seaborn*, 282 U. S. 101 (Wash.); *Jacob O. Bender v. Wm. Pfaff*, 282 U. S. 127 (La.); *Fred O. Goodell v. O. B. Koch*, 282 U. S. 118 (Ariz.); *Hopkins v. Bacon*, 282 U. S. 122 (Tex.); *U. S. v. Malcolm*, 282 U. S. 792 (Calif.). See also *Warburton v. White*, 176 U. S. 484; *Arnett v. Reade*, 220 U. S. 311. In some States the income from the separate property of the spouses does not become community partnership property.

measured in determining the amount of the Federal Estate tax, by the value of one-half of the Community Partnership Estate. Upon the survivor's death, the survivor's half of the property was taxed, as in all other cases. (T. D. 2450, T. D. 3138, T. D. 3670).[2b]

[2b]The Treasury Department Decision applying the Federal Estate Tax to Community Estates of spouses residing in Texas, on this basis, was the first ruling on the subject and was promulgated as early as August 24, 1920 as T. D. 3071. It clearly recognized the distinction between community estates and estates by the entirety.

The second Treasury Decision relative to the application of the Estate Tax to community estates generally, was promulgated March 3, 1921, and was predicated upon the opinion of Attorney General Palmer dated February 26, 1921. It applied the same rule as previously applied in Texas to spouses residing in the states of Washington, Arizona, Idaho, New Mexico, Louisiana and Nevada.

Treasury Decision 3670 was the result of a review of prior rulings regarding the application of the Federal Income Tax Act and the Federal Estate Tax Act to community partnership property of spouses residing in the State of California. The decision left open for review by the courts of the application of the Federal Income Tax, but was accompanied by an opinion of Hon. Harlan Stone, Attorney General, dated October 9, 1924, which precluded any further court tests of the application of the Federal Estate Tax to community estates of citizens residing in California, particularly in view of the opinion of the Ninth Circuit Court of Appeals in the case of *Wardell vs. Blum*, 276 Fed. 226, in which *certiorari* had been denied by the Supreme Court of the United States. Though the Attorney General then recognized that there was doubt under the California decisions as to whether the wife had a vested interest in community property that would authorize her to return one-half of the community property as her own while the spouses were alive, he, nevertheless, reached a different conclusion as to the application of the Federal Estate Tax, saying of the existing exemption of the wife's interest from the Federal Estate Tax:

> "If the widow takes by virtue of her ownership in community property which is held by the community subject only to the power of disposition of the husband, obviously the estate tax has no application. * * * a study of the true character of that interest as it existed in the Spanish Law and as it has been developed in the jurisprudence of the community property states, including California, affords no substantial basis for the hope that a renewal of the litigation on this subject in the Federal Courts would change the result."

The Attorney General in rendering his opinion promulgated as Treasury Decision 3138, discussed the Louisiana Statutes and decisions at some length and emphasized the fact that under the decisions the wife was not required to pay an inheritance tax on her one-half of the community estate, upon the death of her husband. The Attorney General also cited the decision by the Supreme Court of Idaho in the case of *Kohny vs. Dunbar*, (121 Pac., 544), and quoted therefrom as follows:

> "Since the interests of both husband and wife are the same and equal in and to the community property, and each takes one-half interest therein by will, it is clear to us that if the wife must pay an inheritance tax on her half of the prop-

THE 1942 AMENDMENTS

The Revenue Act of 1942 establishes a new and revolutionary method of taxing community partnership property at death. That Act abandons, as to community partnership property, and as to community partnership property alone, the test of ownership at death, as the controlling factor in measuring the tax. It purports to substitute therefor, as to community partnership property, and as to community partnership property alone, varying uncertain capricious, arbitrary and confiscatory tests, some applicable in one case, some in another.

Section 402(b) (2)[3] requires that the entire interest of both spouses in all community partnership property be included in the gross estate of the first spouse to die, with two exceptions only: (1), property received as or derived from compensation for personal services actually rendered by the surviving spouse; and (2), property derived originally from the separate prop-

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[2b]—(continued)

> erty upon the death of her husband, that the husband would likewise be obliged to pay an inheritance tax on his half of the property on the death of his wife. The law clearly places them both on an equality in this respect. This illustration, however, accentuates the unreasonableness of the contention, for no one claims that the husband is required to pay such tax on his interest in the community estate."

Similar expressions are contained in decisions by the courts of other community property states wherein it is universally held that only one-half of the community estate is subject to the State Inheritance Tax upon the death of one of the spouses. For instance, in *Jones vs. State*, 5 S. W. (2d) 973, the Texas Commission of Appeals with the approval of the Supreme Court implied that a construction of the State Inheritance Tax which would subject the whole community estate to such a tax upon the death of one of the spouses would render the statute unconstitutional, and said:

> "To impose the tax under such circumstances would be to visit the tax upon the real owner whose real right to the property has not been affected one way or the other by the death of a co-owner."

See also *Hansen vs. Blackmon, Collector*, 169 S. W. (2d) 955 (Texas Court of Civil Appeals); 169 S. W. (2d) 962 (Supreme Court of Texas.)

[3]See p. 3, *supra*, Appendix p. 1, *infra*.

erty of the surviving spouse.[4] Even as to these items of community partnership property, a minimum of one-half must be included in the decedent's estate, because of his or her power of testamentary disposition over one-half of all community partnership property.

Thus the statute by legislative fiat creates three categories of community property:

(1) The first category includes community partnership properties traceable to the husband's wages or to his separate property. If the husband dies first, all of such community partnership properties must be included in his estate, but if the wife should die first, one-half of these properties is includible in her estate;

(2) The second category includes community properties traceable to the wife's separate wages or to her separate property. If she dies first, all of such community partnership properties fall into her taxable estate; but if her husband predeceases her, one-half of such properties is taxed to his estate;

(3) The third and most important category, since it frequently comprehends the bulk of community partnership property, consists of all properties not directly traceable to the wages or separate property of either spouse.[5] As to the community property falling into this category, the full value is included in the estate of the first spouse to die. If the husband dies first, both halves are included in his "gross estate,"; if the wife dies first, both halves are included in her "gross estate."

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[4]As the Committee Report on the Bill shows, the excepted items include "(1) property acquired in exchange for separate property, (2) community income yielded by such property acquired with such income, and (3) property which may be traced back to property received as compensation, separate property, income from property received as compensation, or income from separate property." S. Rep. No. 1631, p. 231.

[5]See pp. 11 to 13, *supra*.

In the creation of three categories of community partnership property, the orthodox and well recognized constitutional rules of Estate Taxation are abandoned. The Constitutional right of each state to determine the ownership of property is abrogated and three different rules of taxation are prescribed, each to be applied depending upon the circumstances of the particular case.

1. The power of testamentary disposition is selected as the taxable event in certain cases. This may be termed the "minimum rule." A decedent is always taxed under the statute on all property over which he had a testamentary power of disposition. But this power of testamentary disposition is not the sole criterion of taxation. A decedent more often than not is taxed on property over which he had no power of testamentay disposition.[6]

2. The fact that the decedent created the estate is apparently made the basis for the tax in some cases, although here again, this is not the sole criterion.[7]

3. Neither of the foregoing tests of taxability are applicable in those cases where the property is not directly traceable to the separate wages or separate property of either spouse. This is the third category of community partnership property above referred to. The first spouse

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[6]For example, he has no power of testamentary disposition over, but is taxed on, his survivor's share of all property traceable to his own separate earnings or separate property and his survivor's share of all properties not traceable to the earnings or separate estate of either spouse, such as property acquired through community debt or through joint activity, or farming, merchandising and the like.

[7]When the property is directly traceable to the decedent's separate earnings, or to his separate property, and he dies first, the whole of the property is taxed to him; however, if the non-producing spouse dies, the power of testamentary disposition is made the test of taxability so that the non-producing spouse is always taxed on one-half of the property, even though the other spouse may be shown to have produced the same through his efforts. Moreover, in cases falling in the third category above, that is, cases where the property is not ascribable to the compensation or separate property of either spouse, the tax is laid on the whole estate, without regard to who produced it, who owned it, or who had the testamentary power of disposition over it.

to die is taxed on the whole, including the survivor's share, even though he had no power of testamentary disposition over it, and even though he was not the creator of the estate. We are left to conjecture as to the reason or excuse for the tax in such a case. Apparently, each is presumed, contrary to the law and the fact, to own outright the entire property. Cessation of management is not made a test of taxability,[8] the only mention of management of the community partnership being contained in Section 811(G) (4), dealing with life insurance policies.

Thus the statute represents a curious and arbitrary intermixture of disregard for, and regard of, State laws. The law of the State is recognized in determining the minimum taxable estate by the provision requiring inclusion of all property over which decedent possessed the power of testamentary disposition. The law of the State is entirely disregarded in determining the maximum taxable estate by the provision requiring the inclusion of the portion of the community partnership property belonging to the surviving spouse.

The effect of this statute, then, is: to disregard property rights; to tax one taxpayer with respect to the prop-

[8]The statute does not expressly make the cessation of management the excuse for the tax, and, in its operative effect, the statute does not lay the tax on the termination of management. In the case of the wife's prior death, the testamentary power of disposition is selected as the subject for the tax, even though the husband is the manager of her interest in the property. In Louisiana, the husband may have managerial control over his wife's separate earnings and the income from her separate property. Should she die first, the fact that she or her property originated his wealth and not the fact that her husband at that time was the manager, is made the occasion for the tax. In such a case, were the husband to die first, even though his management terminated over all property traceable to his wife's separate earnings or separate property, the statute would tax the husband's estate on his half interest only. Thus, the source of the property in such an instance becomes more important for estate tax purposes than cessation of management. Moreover, cessation of management is utterly disregarded in cases where the wife dies first and her estate is taxed on the whole property as in category 3 above. Cessation of management is not considered where, the management of the property is in the wife; as, for example, where, on a showing of lunacy or abandonment by the husband, the wife takes over administration of the entire estate.

erty of another; to tax him on property which he never owned, which he could not give away, could not and did not transfer at death and which he could never convert into his own separate property. It treats (that is, conclusively presumes) two separate persons as owning the same property at the same time. It makes the tax depend on the sheer accident of which of the two spouses may happen to die first.[9] After taxing the entire community partnership property to the first spouse to die, the survivor is required at his or her death, even though it follows immediately, to pay a second tax on his or her half of the property.[10]

This resume sustains the charge that the amended law applies varying, capricious, arbitrary and confiscatory tests to measure the estate tax laid upon community partnership estates—and upon such estates alone. Other factors reinforce this conclusion.

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[9]The storekeeper and his wife are both regarded as owning at the same time the entire business, including the interest of the other, and the first to die is taxed on the whole. A farmer and his wife are each considered as owning the whole of their lifetime savings, and the first to die is taxed on the whole. A man or wife may purchase securities on credit and pay off the debt with the income therefrom; yet each is considered as owning the whole and the first to die is taxed on the whole. In fact the bulk of all property in the community property states will be taxed to the first spouse to die, because most community partnership property is not derived from compensation or separate property of either spouse (see p. 19 *supra*) and that which is so derived usually cannot be traced to such source

[10]This second tax is applicable even though the surviving spouse dies within five years. Section 812(c) of the Internal Revenue Code, page Ap. 9, allows a credit against the estate tax for property which was within five years subjected to estate taxes in a prior decedent's estate; however, this credit applies only where the property "can be identified as having been received by the decedent from such prior decedent by gift, bequest, devise or inheritance." In a community partnership property state, the surviving spouse does not receive his interest by "gift, bequest, devise or inheritance." His interest was vested when the property was acquired; consequently, the credit is not available. In the case of a common disaster, the whole of the property might be taxed to both spouses simultaneously, and in any event, 150% of the value of the property would bear estate tax. Although the "previously taxed" section was amended in the 1942 Revenue Act, the right to the credit was carefully denied to the surviving spouse in a community partnership state. See Section 812(c), Revenue Act 1942, page Ap. 9. It is only in the community property states that this credit is denied.

The statute will completely confiscate many estates and frequently will deprive a man, after a lifetime of labor, of the right or opportunity to leave anything whatsoever to his children.[11]

Only one-half of community debts can be deducted, even when all community assets are included in the estate.[12] Not only is this grossly unjust, but it will materially increase the number of estates entirely confiscated by the tax.[12a]

If community property is given away, the husband may be treated as the owner of the property, and may

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[11]There is no statutory provision authorizing the decedent's executors to surcharge the surviving spouse's share of the property with any portion of the decedent's tax; comparable to the specific provision (Section 826(c), Internal Revenue Code, Page Ap. 10, authorizing the executors to collect from insurance beneficiaries. Section 411 (b) of the Revenue Act of 1942, Page Ap. 6, imposes a personal liability on the surviving spouse as a transferee, but Section 826 (b) Page Ap. 9, specifically gives the survivor a right of reimbursement. Complete confiscation may also result in case of a common disaster (see Footnote (10), *supra*) or large community partnership debts. For example, if a spouse dies possessed of a one-half interest in a net community estate of $6,000,000.00 in value, the estate tax deductible for his one-half interest, but measured by the whole would be $3,138,200.00, or $138,200.00 more than his entire estate. This would mean, in some cases, that a man's wife, even though estranged, would hold her property free of tax, but the husband would have nothing whatever to leave his devisees, even though they be children of a former marriage.

[12]This is because no change was made in the provision allowing deductions of claims against the estate, in determining the net taxable estate. Only the decedent's debts, that is, one-half of community debts are deductible. See: Section 812(b) Internal Revenue Code, Appendix P. 8.

[12a]In fact, under some circumstances, it will require a tax to be paid by an estate which would owe no tax but for the situation presented by the statute. For example, the only property belonging to a husband and wife is their respective interest in the community which exists between them. That community has assets worth $300,000.00 but owes debts amounting to $350.00.00. The community is therefore clearly insolvent yet, on the death of the spouse dying first the total community property, $300,000.00, would be considered as the base. From this would be deducted only one-half of the debts, to-wit, $175,000.00 leaving $125,000.00. From this would be deducted the $60,000.00 statutory exemption. On the remainder, to-wit, $65,000.00, estate taxes would have to be paid. Thus, estate taxes would have to be paid though in law and in fact the entire estate belonging to the deceased would be consumed by debts and the deceased would have left no net estate whatever.

be required to pay a gift tax on the whole community, even though the "gift" to the extent of one-half be to the wife of her own property, and even though, shortly before, she may have paid income taxes on the same property.[13] Thus, the husband may be regarded as the owner, due to pay a gift tax if a gift is made (Sec. 453); yet, if no gift is made and the wife dies, she is regarded as the owner, and her estate must pay estate taxes on the same property, always on one-half, and, more often than not, on the whole. (Sec. 402 (b) (2)). The arbitrary federal presumption created by this statute in contradiction of the state law determining ownership and, also the difficulty, and in most cases the impossibility, of doing the tracing which the act purports to permit will usually accomplish this unlawful and unjust result.

When life insurance forms all or part of the taxable estate, there is a veritable maze of confiscatory and capricious treatment under both the gift and estate tax laws. Laws of property and laws of insurance are utterly disregarded, and the revolutionary doctrine of dual ownership is prevalent.[14]

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[13]Under Section 453 of the Act of 1942, Appendix Page 6, *infra*, all gifts of community property are charged to the husband, unless the property is directly traceable to the wife's wages or separate property, an impossibility in most cases. If a gift is made of community partnership property in contemplation of death, the husband is regarded as the owner for gift tax purposes, and must pay the gift tax (Section 453). Yet if the wife dies, she is deemed to have made the gift, and must pay the estate tax, not on half of the property, but on the whole, in most instances. (See: Section 402, Revenue Act of 1942, Page Ap. 1 *infra*.) Similarly, if community partnership property is given away, the husband retaining a life income, he is treated as owner of the whole, and pays the gift tax (Section 453). But at his wife's death, she is deemed to have made the gift and her estate bears the tax on the whole. In neither case is the gift tax paid by the husband available as a credit against the wife's later estate tax. (See: Section 183 Internal Revenue Code.) It is only in the community partnership property states that this credit is denied.

[14]If, for example, the wife owns as her separate property a policy of life insurance on her husband's life and premiums are paid thereon out of partnership community funds, the husband must pay gift taxes on the premium payments, since they go to enhance the value of the separately owned property, even though the "gift" is, as to one-half, a "gift" to the wife of her own funds, and even though she may have

In certain cases, the husband will be regarded as the owner of the whole property, and, at his death, his estate will be required to pay the tax on the whole; and yet, contemporaneously, his wife will be regarded as the owner of one-half of the same property and required to pay a gift tax on that share along with the husband's estate tax on the whole.[15]

Where the marriage is dissolved by divorce or separation, the tax is levied as it would have been prior to the 1942 amendment. If death occurs one moment after separation or divorce, only one-half of the property is taxed to the decedent. If death occurs one moment prior to

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[14]—(continued)

paid an income tax on the same funds a few days previously. Yet, after having made the gift, the husband's estate, at his death, must pay an estate tax on the full proceeds of the policy owned by the wife and paid for in half by the wife's funds, on which the husband has paid gift taxes. Previously, insurance proceeds were included only to the extent that the decedent paid premiums on the policy so that, in the community partnership property states, only one-half of the insurance was taxable where the premiums were paid with community partnership funds. (*Lang v. Commissioner*, 304 U. S. 764; *DeLappe v. Commissioner* 113 Fed. (2d) 48 CCA 5th). But under Section 404 of the 1942 Act, Page Ap. 2, *infra*, premiums paid with community partnership funds are considered to have been paid by the insured, unless, again, such funds are traceable to the wages or separate property of the survivor. Similarly, if a husband in a community partnership state takes out a policy on his wife's life in his own favor, and pays the premiums from community partnership funds, her estate must pay tax upon the full policy proceeds, even though the policy is owned by the husband, and he pays for half of the cost.

[15]For example, a husband may undertake to dispose by will of both his and his wife's interest in community partnership property, thus putting his wife to an election. He might give his wife a life income in the whole with remainder to his children. Under the statute, he is regarded as the owner and his Estate must pay taxes on the whole. Yet, if his wife elects to take under the will, she is regarded as the owner of one-half and must pay gift taxes with respect to her one-half interest. The Treasury Department has consistently held that, where the wife elects under such circumstances, she has made an exchange of her interest in the community partnership property for the rights granted by her husband's will. The value of her life interest under the terms of the will is commuted to present worth by use of mortality tables and a 4% discount factor. Where the value of her half interest in the community partnership property, permitted by her to go under the will, exceeds the present worth of her life income under the will, the difference represents a taxable gift from her to the remaindermen. Thus, the same property is both taxed to the husband's estate, as assumed owner, and to the wife for gift tax purposes as owner.

separation or divorce, the whole may be taxed to the first to die.[16] This is perhaps the first time in history that a statute encouraging divorce or permanent separation has been passed.[17] Where the spouses move to a non-community property State, and there invest the community partnership property brought with them, the law, upon the death of either, will regard the first to die as a tenant in common owning only one-half of the property, and limit the tax accordingly,[18] whereas, if they remain in the community partnership property State the whole will generally be taxed to the first to die.

Thus one rule of taxation is applied in the community partnership property States, and another rule, re-

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[16]Section 402 (b) (2) applies only to property held as community property. After separation or divorce, even if there is no partition in kind, the property is held as tenants in common and not as community partnership property.

[17]The temptations to wealthy persons to separate or divorce in order to conserve some of their estate for their children is made apparent by the following: A community estate is $6,000,000.00; under the estate tax law, all of it may be taxed to the first to die, such tax to be $3,128,200.00. The second to die must then pay the tax of approximately $1,263,200 on his one-half interest. Thus the total tax on the death of the two spouses exceeds $4,300,000.00. By permanent separation or divorce, there will be at the death of the two spouses two taxes of approximately $1,200,000.00, or a total of $2,400,000.00, a tax saving achieved by separation of partnership property or divorce of approximately $2,000,000.00.

[18]The law of a new domicile will not recognize the community partnership contact, but it will recognize that the property acquired in Louisiana, or some other commmunity partnership property State, is owned one-half by each spouse, as tenants in common, and the husband will be considered as Trustee of the wife's one half, and be accountable to the wife. (*Depas v. Mayo*, 11 Mo. 314, *Phillips v. Commissioner*, 9 B T A 153, *Succession of Popp*, 146 La. 464, 83 South 765, Solicitors Opinion 121, *Internal Revenue Bulletin*, Dec. 1921, Page 197; *Restatement, Conflict of Laws*, Sections 292 and 293. We have the arbitrary and amazing situation of Congress attempting to fix property rights in only the community partnership states for taxation purposes in the very teeth of the law of the states involved, when, if the same property is removed to the other states of the Union, these latter states recognize the law of Louisiana and the property rights of the spouses, and Congress, following the law of the common law states, taxes the former community partnership husband and wife on the very basis that they would and should have been taxed on if the community property estate tax amendment had not been adopted. In short, Congress continues to recognize for estate tax purposes the law of common law states which recognize in common law terminology the law of Louisiana, but when dealing directly with Louisiana citizens and the same property, the Louisiana property law will be disregarded.

specting the **same spouses** and the **same property,** is applied in the other States.

On the other hand, spouses residing in non-community property states may accumulate community estates there under an ante-nuptial contract, the only difference being that a conventional instead of a legal community is established, within the meaning of those terms as applied to community estates. See *Neves vs. Scott,* 9 Howard (U. S.) 196, *LeBreton, Executor vs. Miles,* 8 Paige (Chancery) 261, *Decouche vs. Savetier,* 3 Johnson (Chancery) 190. *Compare Castro vs. Illies,* 22 Texas 479, where the conventional community partnership established in France, was held not to control as against the legal community partnership existing under the laws of Texas upon removal of spouses to that State.

Since no tax is imposed on the survivor's half of the community partnership property transposed by spouses moving to a non-community property state, the same rule would apply to conventional community partnership property created by contract of spouses in non-community property states. Hence it would develop that under the 1942 Act, what is in reality community partnership property in a common law state, although not technically defined as such, would be accorded the same recognition taxwise as was accorded to all community property prior to the passage of that Act, whereas community property in community states would for the first time be taxed otherwise.

The power of spouses domiciled in a common law state to establish a community partnership by ante-nuptial agreement is discussed and recognized in *McKay's Community Property,* (Second Edition) Section 142 The difference between conventional and legal community of property is discussed in the textbook by

deFuniak on *"Principles of Community Property"*, at Section 54. deFuniak, in his work on Community Property, also says:

> "There can be no more justification for Congress saying that such an inherent principle of the law of the community property states shall be ignored and the income considered as separate property of the one earning it than there would be for Congress declaring that for purposes of taxation it will ignore the law of non-community property states and consider all earnings of one spouse as belonging equally to both." (Section 255, at page 719).

The estate tax statute, as amended, creates different rules of income taxation applicable to sales of community partnership property after death than are applicable to similar properties in other States.[19]

It is apparent, therefore, that Section 402(b)(2) applies varying, capricious, arbitrary and confiscatory tests to measure the estate tax laid upon community partnership estates, and upon such estates alone. It is (1) wholly capricious, arbitrary and violative of due process of law, and (2) offends the geographical uniformity provisions of the Federal Constitution.

II.

Section 402(b) of the Revenue Act of 1942 is so arbitrary and capricious that it violates the Due Process Clause of the Fifth Amendment; considered from the standpoint of State action, the State statute violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

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[19] If community partnership property is sold after the death of one of the spouses, the basis for determining the gain or loss is the value at the date of death of the decedent's one-half interest, and the original cost of the survivor's one-half interest. *Sec.* 113 (*a*) (5) *Internal Revenue Code, p. Ap.* 10 *infra.* The result is that, if community partnership property which has enhanced in value after its acquisition

The statute, as amended by Section 402 (b) of the Revenue Act of 1942, clearly violates the principle announced in *Hoeper v. Tax Commission*, 284 U. S. 206, that "any attempt * * * to measure the tax on one person's property * * * by reference to the property of another is contrary to due process of law." This Court, in the *Community Property Cases* (282 U. S. 101, 118, 122, 127, 792) clearly recognized that the wife is a full and equal owner with her husband in community partnership property. The Court below pointed out that the surviving wife "is the half partner and owner of all acquisitions made during the existence of the marriage." In *Poe v. Seaborn*, 282 U. S. 101, this Court recognized that "the powers of partners, or of trustees of a spendthrift trust, furnish apt analogies." The opinion below points out that "there is no substantial difference between her (the wife's) interest therein and the interest of an ordinary member of a limited or ordinary partnership, the control and management of whose affairs has, by agreement, been entrusted to the managing partner." (R. 29).

Therefore, this statute violates the principle above announced, in that it measures the tax on one persons's property by reference to the property of another, just as it would violate due process to tax one partner at death on the surviving partner's interest, or to tax a trustee at death on his beneficiary's property, where such trustee never at any time owned or at his death had any economic interest in the trust properties. Since "there is no substantial difference", the statute, in measuring the tax of the first to die by the full value of the surviving spouse's interest, lacks due process.

19—(continued)
is sold after the death of one of the spouses, a taxable profit results from the disposition of the survivor's one-half interest, despite the fact that the decedent's estate may have paid an estate tax on the entire property at the value at which it was sold. The rule in other States is that property sold after death carries as its basis for gain or loss the fair market value at the decedent's death.

The following statement from this Court's decision in *Heiner vs. Donnan*, 285 U. S. 312, is apposite:

> "The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no part of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description. Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the *Schlesinger* and *Hoeper* cases condemn as arbitrary and a denial of due process of law. Such an exaction is not taxation but spoliation. 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of government from his own gains and of his own property.'"

And, as aptly remarked by Judge Learned Hand in *Frew v. Bowers*, 12 Fed. (2d) 625, 630 (C C A 2):

> "Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice."

See also *Lewellyn v. Frick*, 267 U. S. 487.

The statute here is much more capricious and much more arbitrary than the statutes considered in any of the foregoing cases. As shown above, it adopts wholly arbitrary and confiscatory tests, applicable only in the community partnership property States. It not only measures one person's tax by another's property, it treats two persons as owning at the same time the same property; it completely disregards States rules of property and

applies one rule of taxation when one spouse dies, and another rule when the other dies. It makes the incidence of the tax depend on the sheer accident of which of the two spouses should happen to die first. It creates double taxation and will completely confiscate many estates.

The statute is also unconstitutional because it creates wholly arbitrary and capricious presumptions contrary to both law and fact. As stated above, the bulk of community partnership property on hand at the death of either spouse will constitute partnership property not directly traceable to the wages or separate property of either spouse.[20] Thus, in the majority of cases, the statute, by taxing the full value of property to the first spouse to die, creates the wholly arbitrary and capricious presumption that the first spouse to die owned the whole of the community partnership property. (Louisiana Civil Code, Article 2405, Appendix pp. 13 *infra*). The fact, controlled by local law, is directly to the contrary. The property is owned one-half by each spouse. Such a presumption is contrary to the facts in this case. Where community partnership property is acquired through the creation of a community partnership debt, or where a storekeeper and his wife build up an estate through their joint efforts, or a farmer and his wife through their joint efforts till the soil, it is utterly contrary to the fact, even if economic contribution were the controlling factor, to say that the entire community partnership property is owned by the first spouse to die; that it is owned entirely by the husband, should he die first, and that it is owned entirely by the wife, should she die first. There is certainly no rational connection with the real facts and the facts presumed. (*Tot v. United States*, decided June 7, 1943, 87 L. Ed. p 1119). As stated by the Court in *Bailey v. Alabama*, 219 U. S. 219, "A constitutional prohibition

[20] See pp 11-13 *supra*.

cannot be transgressed indirectly by creating a statutory presumption any more than by direct enactment." See also *Manley v. Georgia*, 279 U. S. 1, 5-6. Certainly, the presumption in this case that two persons at the same time own in its entirety the same property is much more capricious, arbitrary and unsupportable than the two-year presumption, declared invalid in *Heiner v. Dannon, supra*, and even the six-year presumption invalidated in *Schlesinger v. Wisconsin*, 270 U. S. 230. See also *Hall v. White*, 48 F (2d) 1060; *Guinzberg v. Anderson*, 51 F (2d) 592; *American Security Company et al.*, 24 B T A 334; *State Tax Commission v. Robinson's Executor*, 234 Ky. 415.

No one would suppose that Congress could retroactively impose an estate tax with respect to an irrevocable outright gift of property made by the decedent to a member of his family, where such a gift was neither in contemplation of, nor intended to take effect in possession or enjoyment, after death. (*Nichols v. Coolidge*, 274 U. S. 531). This statute does even more than this. It undertakes to ascribe significance to the origin of wealth without regard to the ownership of property at origin or at death.[21] It undertakes to tax an individual merely because his action gave rise to that wealth, although at the time of its acquisition he did not own the property and, at the time of his death, he possessed no economic interest therein. Indeed, this statute contains all the pernicious elements of a retroactive law. For the first time it undertakes to make the estate tax depend on the source of funds used in acquiring property many years prior to death. It

[21] This attempt by the statute to attribute importance to "compensation for services actually rendered" by one spouse or the other is, of course meaningless, since under community property law, community property is not earned or derived by the spouse whose services may have preponderated in producing it, but by the community. As this Court said in *Poe v. Seaborn, supra*: "But here the husband never had ownership. That is in the community at the moment of acquisition."

imposes upon spouses in the community partnership property States the impossible burden of tracing back through the many transactions of a long lifetime the origin of each item of property on hand at death. Unless this origin is traced into the separate earnings or the separate property of the survivor, the estate of the decedent must pay the tax on the whole. (Even if a successful tracing to the survivor could be accomplished, the decedent's estate must, nevertheless, pay the tax on half). Never before has it been intimated that husband and wife must between themselves maintain accurate records of their individual transactions. This statute then takes them entirely by surprise and by reaching back and attaching tax significance to methods by which property was acquired many years prior to death, it contains all of the unjust elements of a retroactive tax. *Cf. Frew v. Bowers*, 12 F. (2d) 625, 630, and see *Stone, J.* dissenting in *Heiner v. Donnan, supra*, 285 U. S. 312.

As stated in *Nichols v. Coolidge, supra*, "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions not testamentary in character and beyond recall."

The statute cannot be supported on the basis that economic benefits were shifted by death. True, at the husband's death, there is frequently a shift in management." But the summary of the rights held by the wife, when contrasted to the limited, restricted and circumscribed agency powers of the husband (pages 13-15 *supra*)

"But there is no such shift where the wife is the manager, as in Texas, of property acquired with her separate earnings or with income from her separate property; or where by virtue of ante-nuptial contract, the wife is made manager of the community, or where, in the case of abandonment or lunacy, the wife becomes manager of the community.

is sufficient to show that the husband's death confers no real or substantial economic benefits on the wife with respect to that one-half interest in the partnership property, which she has always owned. Under the Louisiana law, the wife, by not contracting otherwise, voluntarily selects her husband as the manager of her business affairs and her half of the community partnership property. It is difficult to understand how her husband's death can be said to be an economic benefit to her in any sense of the word. She loses the business manager she voluntarily selected by contract. Her husband's death is a disaster, not a benefit. Certainly no one would suppose that a statute which undertook to tax a trustee at his death on the value of his beneficiary's property, or to tax an agent at his death on his principal's property or to tax a managing partner of a partnership at his death with his partner's interest in such partnership, comported with due process. Something more than mere management must pass. There must be some shifting of economic interest in the whole property to justify an estate tax measured by the whole of that property. It will not do to select one straw from the bundle of rights that go to make up ownership (when that straw is so unsubstantial that it may be changed as often as State law-makers see fit, or by contract, or otherwise, without affecting ownership), and to tax that straw on the basis of the value of the whole. That the tax must be measured by the shifting of real economic benefits as distinguished from mere agency or trust powers is shown by the decision of this Court in *Reinecke v. Northern Trust Co.*, 278 U. S. 339, where the Court spoke through Mr. Justice Stone, saying: "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or enjoyment of the property. He could equally have reserved all these powers and others

had he made himself trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made." So, in this case, the economic interest was the wife's from the moment the property was acquired. It was complete at that time and did not pass at the husband's death upon the mere cessation of his management.

In *Warburton v. White* 176 U. S. 484, and *Arnett v. Reade*, 220 U. S. 311, this Court distinctly held that the management and control of the husband in a community partnership State is not property, but that the wife's half interest in community partnership property is an absolute property interest protected by the Fourteenth Amendment. By these cases, this Court conclusively established that under the Federal Constitution a husband, having by state law the management and authority to dispose of community partnership property, may be deprived of that statutory agency by subsequent State statute without compensation. Conversely, this Court there held that the wife having a half interest in community partnership property cannot be deprived of that half interest by change of local statutory law, whereby the husband is given the power of management. Therefore, it is manifest that the 1942 Statute apparently undertakes to tax as property that which this Court holds is not property, namely, the husband's power of management, and refuses recognition to that which this Court holds is property, namely, the wife's vested ownership of one-half of the community partnership property.

Moreover, as we have pointed out above,[**] the statute, neither in terms or in operative effect, is directed at

[**] See footnote 8 p. 21 *supra*.

cessation of management. In most cases where the wife is the first to die and where she is taxed on the full value of the community estate including her husband's one-half interest therein, there is not even the cessation of bare management at her death. She had no management of either half interest prior to her death. After her death the husband continues to manage his half interest. In all such cases there is not even the shifting of bare management of the husband's share of the property. Yet his share is included in the tax imposed upon the wife's estate."[**b]

We submit that the statute clearly offends the Due Process Clause of the Fifth Amendment; to permit Louisiana to enforce its claim for an additional tax predicated upon this statute would violate the Due Process Clause of the Fourteenth Amendment.

III.

The statute cannot be justified in the Tyler, Jacobs or Moffitt Cases

The Committee reports show that reliance, as to the constitutionality of the statute, was placed upon the *Tyler* case, 281 U. S. 497 (Estates by Entirety), and the *Jacobs* case, 306 U. S. 363 (Joint Tenancy). But these cases do not support the amendment. The statute involved in those cases concerned transfers by the decedent, either mediately or immediately, to his wife or to others as a tenant by the entirety or as a joint tenant with him. It dealt only with property which had originally belonged to the decedent. It dealt with such property only when

[**b]In this aspect it would seem that the tax is not an excise at all, since nothing happens with respect to the survivor's property that can be made the excuse for a tax. Yet the survivor's property is used as a measure for the tax. The tax is, therefore, a property tax disguised as an estate tax, and being a property tax, is a direct tax not apportioned between the States and, therefore, unconstitutional.

the decedent in his lifetime had made a transfer thereof by gift or without consideration, retaining the right of survivorship always attached to such estates. This particular statute had been adopted to stop loop-holes and prevent estate tax avoidance. Thus, in the cases the Committee erroneously relied upon, the Court had before it merely the question of including in the decedent's estate a gift by the decedent, which did not ripen into a complete gift until his death. The transfer was to take full effect in possession and enjoyment only on death. By gift, the decedent had created an estate which, if his joint tenant died first, would return in full to him and which required his prior death to confer on his donee the full possession, use or enjoyment of the property. Thus, the statutory provisions dealing with joint tenancy and tenancy by entirety were directed at, and reached, transfers testamentary in character, in which substantial economic rights were retained in the donor for his life. The decisions in the *Tyler* and *Jacobs* cases are based upon three grounds, none of which apply in the case of community partnership property."[*]

I. Death resulted in enlarging the survivor's property rights in all property used to measure the tax. Until such death, the survivor was not the complete owner of any share of the property; the legal rights of the decedent reached every part thereof. Death, therefore, became the generating source of important and definite accessions to the survivor's property rights. In contrast, the death of a community partnership spouse does not generate added property rights in the survivor's one-half of the property. If the wife should die first, nothing, even in

[*] "In the *Estate of Rogers v. Helvering*, decided December 6, 1943, Mr. Justice Frankfurter, speaking for the majority of the Court, said, "For the purpose of ascertaining the corpus on which an estate tax is to be assessed, what is decisive is what values were included in dispositions made by a decedent, values which but for such dispositions could not have existed."

the nature of management, passes from the dead to the living with regard to her surviving husband's share of the property. Yet the wife's estate, in most instances, is subjected to a tax on all of the husband's share. When the husband dies first, the only rights devolving upon the wife are the bare managerial rights over her property theretofore held by her husband. These are not substantial rights in any economic sense. A shift in the power to manage property may not be made the occasion of a tax measured by the value of that property.

2. In the Tyler and Jacobs cases, all of the property came mediately or immediately to the tenancy as a pure gift from the decedent. Manifestly, this is not true of community partnership property. The character of community attaches to the property at the moment of acquisition and not because of a gift or the voluntary choice of either or both husband and wife.

3. In the *Tyler* and *Jacobs* cases, the statute (there dealt with) was a means appropriate to the legitimate aim of Congress of preventing tax avoidance, in whole or in part, by *inter vivos* donation of the property of one to another. This was a just basis for the decisions, but it has not the remotest application to community partnership property.

Nor is *Moffitt v. Kelly*, 218 U. S. 400, relied on by the Government below, in anywise controlling. In that case, this Court sustained a California inheritance tax levied at the husband's death upon his wife's community interest therein as against the claim that such tax offended the Due Process Clause of the Fourteenth Amendment. There the Court held that the State had the power, not limited by the Fourteenth Amendment, to select as the subject for taxation the cessation of the husband's pos-

session and enjoyment at his death, even though the wife's interest therein might be deemed to be "vested". It should be observed that the law under consideration was a State, not a Federal, statute; and that the case arose at a time when the law of California fell short of being a community system of the type always prevailing in Louisiana, and now prevailing in California. At that time, as the decisions of this Court in the *Robbins* (269 U. S. 315) and *Malcolm* (282 U. S. 792) cases, and of the 9th Circuit in *Wardell v. Blum* (276 Fed. 226) show, the wife had no real vested interest and no real ownership in one-half of the property. She had an expectancy, and this expectancy was "vested" in the sense that the husband could not disinherit her. But the wife was not an equal owner with the husband, and she had no power of testamentary disposition over any part of the community if she died first. The property was the husband's whether she lived or died, subject only to the provision that he must leave her one-half at his death. The *Moffitt* case, therefore, does not sanction and approve a statute of the kind here under consideration. The State Inheritance Tax Law in question did not, as does the Federal Estate Tax Law here involved, undertake to treat the husband and wife as if each owned all of the property at the same time. It did not attempt to tax the first of the two spouses to die on the whole property. It did not make the tax depend on the sheer accident of which spouse died first. It did not provide for taxing the wife at her death on any part of the property because under the California law, as it then was, the wife did not own any interest in the property and had no power of testamentary disposition over same. The statute there did not at once recognize and ignore the property rights of the two spouses. The statute there did not create presumptions, contrary to law and to fact, that both hus-

band and wife at the same time owned all of identical property. Consequently, the *Moffitt* case in no wise puts the stamp of approval on a statute of the kind here under consideration. It is true that the Court in its decision stated that the State could select as the subject for taxes the cessation of the possession and enjoyment of the property at the husband's death, even though under California law her expectancy was vested in the sense that he could not disinherit her. But this does not mean that the Federal Government could select as its subject for taxation the bare cessation of management where ownership was vested in another, nor did the Court there so decide. There is a difference between the cessation of possession and enjoyment, i. e., a cessation of property interest, and a bare cessation of management of property belonging to another. The *Moffitt* case certainly did not hold that Congress could make the bare cessation of management of another's property the occasion for an estate tax.

Assuming that a State might under the Fourteenth Amendment select such a subject for taxation, this would not mean that the Federal Government could without violating geographical uniformity,[22d] select such a subject for taxes in certain States only. Moreover, it has been shown that the Estate Tax Amendment of 1942 does not make the bare cessation of management the subject of the tax. The statute makes no reference to the cessation of management as the occasion for taxation. On the contrary, it adopts the power of testamentary disposition as the occasion for the tax in certain cases; the origin of the wealth as the occasion for the tax in other cases; and creates the wholly insupportable presumption of dual ownership of the entire property as the rule of taxation in most cases. Thus, the *Moffitt* case in no aspect can be regarded as supporting the tax in question.

[22d] See p. 41 *infra*.

IV

Section 402 (b) is Lacking in Geographic Uniformity.

Not only does the statute, as amended by *Section* 402 (b) of the 1942 Act, violate due process, but it offends the Constitutional requirement that all excise taxes be uniform throughout the United States. (Article I, Sec. 8, Clause 1 of the Constitution). This uniformity provision refers to geographical and not to intrinsic uniformity. (*State of Florida v. Mellon*, 273 U. S. 12; *Crooks v. Harrelson*, 282 U. S. 55; *Knowlton v. Moore*, 178 U. S. 41). It prohibits the "levying of duties imposed or excised upon a particular subject in one state, and a different duty imposed or excised on the same subject in another state," and it does require that **"whatever plan or method Congress adopts** for laying the tax in question, **the same plan or method must be made operative throughout the United States,"** and that **"wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate."** (*Knowlton v. Moore, supra*).

The 1942 Amendment does not make operative "the same plan" or "the same method * * * throughout the United States." It does not tax the same subject "everywhere throughout the United States."

The Federal Estate Tax Law is an excise on the privilege of passing property at death. (*United States Trust Company v. Helvering*, 307 U. S. 57). (*Landman v. Commissioner*, 123 Fed. (2d) 787 CCA 10) (*Porter v. Commissioner*, 288 U. S. 436, 444) (*Knowlton v. Moore*, 178 U. S. 41, 56).

By its general plan the tax is imposed "upon the transfer of the net estate of every decedent" **(Section 810 Internal Revenue Code)** and the property subject to the

tax is limited "to the extent of the interest therein of the decedent at the time of his death." **(Section 811 (a)).** Thus, the plan is to impose a tax upon the "transfer" of property at death measured by the value of the decedent's interest in such property."* The "subject" of the tax is this privilege of transfer by death. This was the subject of the tax in the community partnership property states until the passage of the amendment in question. This amendment adopted a new plan and selected new subjects of taxation in the community partnership property states, leaving undisturbed the original plan and the original subjects of taxation in all other states.

The amendment, by its terms, is addressed only to community partnership property held "under the law" of the community partnership states. It has no operative effect in other states. It is apparent from the analysis that we have given above (pp. 18-29, *supra*) that the plan or method laid down for community partnership states is not the same as the plan or method prescribed for the rest of the Union. It is likewise ap-

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*The only exceptions to the plan of limiting the tax to property beneficially owned at death by the decedent are: (1) transfers in contemplation of or intended to take effect in possession or enjoyment at or after death, including transfer where possession, use, enjoyment or income is reserved for the decedent's lifetime (Sec. 811 (c)). (2) Transfers where the decedent reserved power to amend or revoke a gift (Sec. 811 (d)). (3) Transfers by decedent to his wife or a third party of an estate by the entirety or joint tenancy (Sec. 811 (c)). In each case the *inter vivos* transfer is specifically includible only if the decedent originally owned the property and he made or caused the transfer to be made donatively and without consideration.

And in each case the *inter vivos* transfer must be donative or testamentary in character (e. g., transfers in contemplation or to take effect at death) or such as would not serve finally to vest the property in possession or enjoyment until the transferor's death (e. g.), joint estates with survivorship, revocable trusts). In each instance, a specific statutory provision was enacted to prevent tax avoidance. These serve to emphasize the basic character of the tax as an excise on the privilege of passing property at death.

In the *Estate of Rogers v. Helvering*, decided December 6, 1943, Mr. Justice Frankfurter, speaking for the majority of the Court, said, "For the purpose of ascertaining the corpus on which an estate tax is to be assessed, what is decisive is what values were included in dispositions made by a decedent, values which but for such dispositions could not have existed."

parent from the express terms of the statute that the subject of the tax is different in these states from the subject of the tax in the other states of the Union.

(a) In all other states the general plan of taxation is to tax the transfer of the decedent's interest in the property, that is, his ownership thereof at death. In the community partnership property states, ownership of property is entirely disregarded, and the decedent is taxed with respect to property which he never owned and which he could not transfer at death.

(b) It is only in the community partnership property states that significance is given to the origin of the property. In the other states, the fact that a decedent created wealth is not made the occasion for a tax if he did not own the property at his death.[23] But in the community partnership property states the mere fact that the decedent created the wealth is alone sufficient to tax him on the entire property, even though at his death he owned only half thereof.

(c) It is only in the community partnership property states that a presumption is adopted to the effect that a man and wife shall both be deemed at one and the same time to be the owner of all of the same property (i. e., that both are presumed to be the owners of the other's property), and that both are taxed on the other's property, and the tax made to depend on the sheer accident of which spouse may happen to die first.

(d) It is only in the community partnership property states that a bare cessation of management over property administered for another is apparently made the occasion for the tax. In the other states, the death of a partner, though he be the managing partner, does not result in the inclusion of his surviving partner's interest

[23]See preceding footnote.

in his taxable estate. In the other states, the death of a trustee does not result in an estate tax on such trustee's estate measured by the beneficiary's property. But as to the community partnership property states, the statute provides that the managing partner of the connubial partnership may be taxed on the survivor's share, and the husband, as fiduciary, may be taxed at death on property held beneficially by him for his wife.

(e) Not only is uniformity denied because property rights (in the surviving spouse) are subjected to the tax, while essentially identical rights (in the surviving spouse) in non-community property states go free; it is even more flagrantly denied in the respect that while denying reality to the wife's rights in those cases where conceding their substantiality would result in exemption, the statute concedes their substantiality where the concession results in additional taxation.

Thus, if the husband should die first, the full community partnership estate is, more often than not, made the measure of the tax, thus disregarding the wife's half interest in such property. But, where the wife dies first, at least her half interest, being the property of which she has the testamentary disposition, is subjected to the tax. Thus the statute attaches consequence to ownership only when the concession results in taxation, but denies it in the converse case. In no other case, and in no other part of the Union, save in the community partnership property states, does the law concede or deny the existence of property rights solely for the reason that concession or denial enriches the Treasury in the particular case. In capriciously denying, or capriciously insisting upon the reality of the wife's interests according to the effect upon the revenue, the 1942 Act departs from the principle of uniformity, since the locale to which these discriminations

are limited is the community partnership property states, and there are no comparable provisions applicable elsewhere.[23a]

It is not contended that excises imposed by Congress must be of such a character that they actually produce revenue throughout the Union. The only requirement of the Constitution is that they must operate impartially wherever conditions are such as to bring them into effect. Thus, the rule of geographic uniformity does not prevent Congress from placing an excise tax upon tobacco, notwithstanding the fact that tobacco is growing in only a few states (*Edye v. Robertson*, 112 U. S. 580). But in the present case, it is not true that the subject matter of the tax is found only in certain states. On the contrary, it is true that there are comparable, even identical, relationship and situations elsewhere, which, because of the admitted and purposeful territorial limitations of the Act, are not subjected to the tax, thus making geographic uniformity impossible.

As the Court below pointed out, there is no substantial difference between the wife's interest in the community partnership and the interest of an ordinary member of a limited or ordinary partnership.[23b] As this Court

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[23a] Consider the case of domiciliaries of Louisiana moving to a common law state, Footnote 19, *supra*. That state will recognize the common ownership of their property, although their property is no longer "community property". At death they will each be taxed on his or her half only, whereas, if they remained in Louisiana the whole would have been taxed to the first to die. A different rule of taxation is prescribed, therefore, with respect to the same persons and the same property merely because of the locale.

Consider also the case of domiciliaries of common law states wherein spouses are permitted to make contracts establishing community ownership as set forth on page 27. The Dominion of Canada Succession Duty Act makes no similar discrimination against spouses holding property under the community laws of the Province of Quebec.

[23b] Article 2807 of the Louisiana Civil Code, when considered in the light of the Louisiana jurisprudence and the other articles of the Civil Code is not inconsistent with the partnership analogy, but is merely explanatory of the difference between the *marital or community partnership* and *ordinary partnerships* in Louisiana. This

observed in *Poe v. Seaborn, supra*, "powers of partners or trustees of a spendthrift trust furnish apt analogies." There may be some formal and technical differences, but the question here is: Are these differences of such weight or importance that consequences so divergent may be applied to their transfer at death.[24]

[23b]—(continued)

article provides that "the community of property created by marriage is not a partnership; it *is the effect of a contract governed by rules prescribed* for that purpose in this Code". This article is found under Title XI of the Louisiana Civil Code dealing with ordinary and commercial partnerships. The statement that the community is not a partnership, when read in the light of the two parts of the Code, was merely intended to indicate that the community partnership was not the kind of ordinary commercial partnership dealt with and regulated by the articles under Title XI, but was governed by somewhat different rules and articles, namely, the rules and articles governing the community partnership or "legal partnership" contained in Section I, Chapter III, Title VI of the Louisiana Civil Code. The few Louisiana cases, (*Succession of Boyer*, 36 Louisiana Annual 506; *Baird v. Lemee*, 23 Louisiana Annual 424, *Mackenroth v. Pelke*, 171 Louisiana 842, 132 So. 365), citing Article 2807 of the Louisiana Civil Code refer to the article only in support of holdings that certain rules and articles of the Louisiana Civil Code applicable to ordinary partnerships do not apply to the community partnership which is regulated by different rules and articles. On the other hand, numerous articles of the Louisiana Civil Code dealing with the community partnership, and many decisions of the Supreme Court of Louisiana refer to the community of acquets and gains as a *community partnership*, and point out that the community partnership is more analogous to an ordinary commercial partnership than any other legal relationship. For example, in *Childers v. Johnson*, 6 Louisiana Annual 634, at page 641, the Supreme Court of Louisiana, in dealing with a case where community funds acquired after marriage had been used to pay a debt incurred by the wife prior to marriage, said:

> "This partnership, the intervenors, who are creditors of the community, have a right to consider as a legal entity; *like other partnerships*, it must be contemplated as an ideal being, *etre moral*, distinct from the persons who compose it, having its rights and its obligations, its assets and its liabilities, its debtors and its creditors. Mrs. Patton is not the debtor of her husband for the $2,000.00 expended for her benefit. She is the debtor of the community. She owed this debt before her marriage. The community derived no benefit from its creation. Instead of paying it with her own money, it has been paid with money of the community. * * * Is she permitted thus to enrich herself, at the expense of the community, and of *bona fide* creditors of that community? Clearly not. This results from that general principle *applicable to all partnerships*, which is, that a partner must account to the partnership for what he has drawn from it for his individual business and advantage. * * * "

[24]Consider, for example, an actual case where the wife died first and *all* of the community was included by the taxing officers as a part of her gross estate, and a deficiency demanded on that account

No Court has been more firm than this Court in insisting that taxation is a practical matter. (*Helvering v. Horst*, 311 U. S. 112). We are admonished that "taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed,—the actual benefit for which the tax is paid" (*Corliss v. Bowers*, 281, U.S. 376, 378 (1930); *Estate of Hanford v. Commissioner*, 308 U.S. 39, 43 (1939). See also *Helvering v. Clifford*, 309 U. S. 331 (1940); *Harrison v. Schaffner*, 312 U. S. 579 (1941); *Griffiths v. Helvering*, 308 U. S. 355 (1939)). The subject of death duties, as of gifts, has "come to be identified more nearly with a change of economic benefits than with technicalities of title" (*Burnet v. Guggenheim*, 288 U. S. 280, 287 (1933)). Unless "technical distinctions" (*Chase National Bank v. United States*, 278 U. S. 327, 336 (1929), and "attenuated subtleties"

24—(continued)

from her executor. These spouses, soon after marriage, purchased on credit a tract of land. This land was community partnership property. They farmed it, each actually doing physical labor in planting and harvesting crops. They prospered, paid for the land, bought other lands, and ultimately accumulated a substantial estate, without either ever having at any time any separate property, and without either having received anything whatsoever as compensation for personal services; but with each making a substantial contribution in direct labor to the acquisition of each community asset. When the wife died, all property was taxed as a part of her gross estate; when the husband dies, one-half of the same property will be taxed as a part of his estate.

To determine the geographic uniformity of this tax, contrast it with the tax which would have been levied had these spouses resided in a non-community property state and had taken title to the properties acquired as joint tenants, tenants by the entirety, or *as partners*. In neither case would the estate of the spouse first to die have been required to pay a tax measured by more than one-half of the jointly owned property. Yet it is clearly not true that there would be any greater enhancement in the managerial or proprietary rights of the surviving spouse in the other one half of the jointly owned property in the community partnership property state than there would be in the non-community property state. The contrary is clearly true in the case of joint tenancies and tenancies by the entirety. In short, the lesser increase in purely managerial rights, if in fact there is any increase at all, is made the occasion for an increase in tax liability solely because the taxables and property are located in community partnership property states; while corresponding or greater increases in managerial and proprietary rights when the taxables and property are located in non-community property states *are not made the occasion for any increases in tax liability.*

(*Lucas v. Earl*, 281 U. S. 111, 114, (1930)) are to be again raised to a regard from which they have fallen, it must be concluded that the 1942 Act operates in non-community property states with results which are vastly different from those which are attendant upon it in community partnership states, and are discriminatory against the latter. To uphold the contrary is to place reliance upon "elusive and subtle casuistries" possessing "no relevance for tax purposes"; which are presently—and rightly—in such ill repute (*Helvering v. Hallock*, 309 U. S. 106 (1940)).

The Committee reports state that, in adopting this amendment to the Estate Tax Law, the Congress was attempting to remove what it deemed to be an advantage. If it was the Congress' aim to place the community property states on an equality with the common law states, the statute in question is wide the mark. Far from equalizing the tax, Congress has seriously discriminated against the community property states as shown above and has made the burden of estate taxes heavier in those states than in other states.[25] In any event, with deference, we submit that the Committee seems to be unaware of the real nature of the community partnership and substantially similar legal relationships in other

[25]For example, a man in New York accumulates a net estate of $1,000,000 and dies leaving a typical Will whereby his wife receives the income from his estate for her life with remainder to his children. His estate tax is $325,700.00. At his wife's later death, her life estate terminates and no tax is payable when the property passes to the children. Contrast this with the Louisiana citizen who accumulates the same amount and dies leaving the same Will. He must (in most cases) pay the same tax at his death, but since his Will passes only his half interest, his wife at her later death must pay an estate tax on her half which amounts to approximately $140,000.00. These two spouses in Louisiana pay, together $465,000.00 or nearly 50% more than the New York spouses pay. Similarly, if in the same illustration, the wife of the New Yorker died first there would be no tax but her husband would pay $325,700.00 at his later death. If the Louisiana wife died she would pay $325,700 (in most cases) as against zero for the New York wife, and her husband must pay an additional $140,000.00 at his later death. Again they pay nearly 50% more than the New York couple.

states. An advantage for tax purposes presupposes that certain individuals or legal relationships are selected and given more favorable treatment than that accorded substantially identical relationships or individuals similarly situated. It is not discrimination to tax one more than another if one actually owns more than the other. Husbands and wives who have contracted and adopted a community partnership under their local state law are not in the same situation with regard to property rights as husbands and wives generally in other states. The fundamental and practical features of the community partnership law, previously enumerated in our summary, show clearly that the community partnership between husband and wife is in no sense a fiction, but is in substance a partnership imposed by contract and law. Therefore, the test of discrimination is a comparison between how marital partners are taxed in community property partnership states and how they are taxed in other states. When so examined, it clearly appears that the 1942 Amendment did not remove, but actually created, discrimination based only on geographic location.[26]

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[26]The so-called tax privileges which prior to the Amendment of 1942 were enjoyed by the husband and wife who had contracted a marital partnership in community partnership states are now given and will continue to be given to all of the substantially analogous legal relationships in other States, because the 1942 Amendment is only applicable to the community partnership states. For example, husbands and wives in many common law states may by contract voluntarily form a partnership substantially similar to the community partnership. In most states, the husband, by donating half of his property to his wife, and obtaining an appointment from the wife as managing agent of her property, brings about a legal relationship with regard to marital property similar to the community partnership. *Tracy v. Commissioner* (C. C. A. 6th Cir.) 70 F. (2nd) 93; *Verden v. Commissioner*, 6 B. T. A. 1123; *Wright v. Commissioner*, 26 B. T. A. 21; Commerce Clearing House Income Tax Service, see rulings set out in Section 1169; See also *Dunham v. Commissioner*, 27 B. T. A. 1068; *Gillette v. Commissioner*, 18 B. T. A. 434; In re: Bellingrath, 3 B. T. A. 11; *First National Bank v. Commissioner*, 13 B. T. A. 1096. A spendthrift trustee and the beneficiary or beneficiaries of such a trust is a common law legal relationship substantially similar to the community partnership relationship. The ordinary limited partnership with a managing partner is another example. In *Poe v. Seaborn*, *supra*, this Court recognized that "the powers of partners or of trustees of a spendthrift trust, furnish apt analogies".

In last analysis, every complaint of discrimination and special privilege addressed to the recognition of community partnership property for tax purposes originates from the conception, wholly erroneous, that the systems of marital property rights prevailing in non-community property States are superior to community partnership systems; are more intrinsically just, are more in line with general conceptions of ownership—if any such there be. These critics take the view that the smaller number of States should conform their systems of marital property rights to the systems prevailing in the larger number of States. This does not have the merit of a national system. It involves no concessions from the States in the majority, simply a surrender of rights by the minority.[27]

Since the adoption of the Federal Constitution there has been a constant change in the marital property systems in force in most of the States. Perhaps all of the original thirteen states at an early date had the old common law concept of marital property rights, the merging of the wife's identity with that of the husband and his acquisition upon marriage of all of the property which she then owned and all of the fruits of any activity in which she might thereafter engage. The necessary result of this system was to build up the estate of the husband. Everything was his, including his wife. Every departure from this ancient concept was in the direction of increasing the wife's property rights:—her right to continue to own the property which belonged to her at marriage; her right to profit individually by her own efforts and activities; and her right to manage her property and the

[27]This view has the further vice of looking only at so-called benefits and disregarding burdens. See the rights of the wife in community property summarized at pp. 13-15, *supra*. As to comparative justness, we merely repeat the community property view—even though entirely non-commercial, the wife's activities merit as much economic reward as do the husband's commercial activities. She is entitled to her rights—not gratuities.

fruits of her effort. Every such statutory change dismin-ished the property of which the husband might die pos-sessed; consequently, it diminished the tax which could be levied upon his estate. These statutory changes came at dif-ferent times in different states. In common law or code states there has been, and there no doubt is today, sub-stantial variations in marital property systems. So, if A and wife lived in South Carolina or Maryland, there may be a substantial difference in their rights to property acquired during the existence of the marriage from what those rights would have been had they acquired the same property from the same sources while residing in Wis-consin or Missouri. Is it discrimination or an unfair privilege, or estate tax advantage, to recognize those dif-ferent marital property systems in determining the inci-dence of the tax? No one will so contend. Yet, discrimi-nation is there in just the same sense that it exists be-tween the community property and other states. If, for example, New York should decide to revert to the ancient common law doctrine, would it be discriminated against because the Federal Government, having nothing to do with its decision so to revert to that system, recognized it in determining the incidence of the Federal Estate Tax upon its citizens?[28] The same answer must be given to every assertion that citizens of community partnership states enjoy special privileges or tax advantages. Like-wise, every failure to measure the tax by ownership re-sults, not in removing an assumed advantage, but in gross discrimination and an unconstitutional lack of uni-formity.

The short answer to all of the claims of special privi-lege is that neither Congress nor any other branch of

[28]Differing rules as to the ownership of earnings of minor children furnish another example of such discrimination. Cf. the California law depriving parents of all, or part, of their children's earnings. (California Civil Code Sec. 361, 362.)

the Federal Government is concerned with or has any power over the marital property systems in force in the various states, and, where these systems have a bearing upon the incidence of a federal tax, the extreme limit to which any branch of the Federal Government can go is to examine them as they are construed and applied by state courts to determine whether they are real and whether, tested by basic concepts of ownership, the one declared by state law to be the owner of property is actually such. Having so determined, the incidence of the tax is controlled thereby and that this incidence may be varied in the different states is no tax advantage.

It is apparent, since the law of each state must determine questions of ownership, that it is not possible to obtain identical practical results from the operation of the Federal Revenue Laws in each of the forty-eight states of the Union, unless Congress wishes to do violence to the dual character of our Government and the historic and settled principle that the Federal Government will recognize marital rights and the ownership of property as defined and created by local state laws in the various states.[29]

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[29]Congress has, of course, no power to legislate on domestic relations, proprietary interests in property or the origin of ownership, as these questions are exclusively within the powers of the States. *Ohio v. Agler*, 280 U. S. 379, 74 L. Ed. 489; *Smith v. Alabama*, 124 U. S. 465. To the extent that this statute undertakes to create property interests not recognized by state law, it violates these fundamental principles and strikes at the very root of our dual system of government. *McCullough v. Maryland*, 4 *Wheat.* 316-437, 4 L. Ed. 579, Slaughter House Cases, 16 Wall 36-130, 21 L. Ed. 394.

It is, on the other hand, the peculiar and special province of the states to enact legislation which will make for stability of the family and encourage family life. In the exercise of this province, certain of the states, long before the adoption of any federal income or estate tax laws, have seen fit through community partnership property laws to invest husbands and wives with a community or partnership of interest in the business and financial transactions of each other, as well as in their social and personal relationships. This constitutes a valuable advance in the recognition of women's rights and in social progress. It gives, particularly to the wife, a position of security and a just, direct and vested ownership in the financial gains resulting from the endeavors of her husband and herself. It invests the wife with the status of

The Treasury Department, which sponsored the Estate Tax Amendment, seems to feel that uniformity is desirable. It is obvious that mathematical uniformity cannot be obtained by having Congress, in the form of a discriminatory legislative act, **disregard the fundamental laws of some states of the Union, and at the same time, recognize the local law of all of the other states of the Union as a guide and basis for the application of the Federal Estate Tax Law.** If the Government desires to tax the separately owned property and estates of both husband and wife as a whole and as a unit, it is not constitutional or fair to attempt to bring about this result by legislative *fiat* in only a few selected states of the Union. If identical mathematical uniformity is sought

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[20]—(continued)

equality and emancipates her from the limitations and status of inferiority to which she was subjected under the ancient common law principles. It enables the wife to maintain her self respect as a human being with equality with her husband and thus eliminates the irritation which otherwise may arise between those essentially equal but occupying positions of dominance and subservience.

The community partnership property system ministers to the success of family life. It is only natural that a wife who has vested community ownership in the earnings of her husband will take a greater interest and cooperate with more enthusiasm in the activities in which her husband may be engaged than will a wife who is by law made inferior and dependent upon her husband's generosity. These are the concepts which underlie the community property system.

The policies of the various states which have adopted the community property system, involving the recognition of these progressive concepts and the attempt to establish a better plan of marital relations in their respective states, are justly deserving of encouragement and support. At least such states should not be thwarted or embarrassed in the adoption and administration of such policies by any legislation of the Federal Government, which will render less effective the community property partnership system, or deny to the members of the marital partnership the full benefits and enjoyment of the rights thus established.

It is of the utmost importance that federal legislation shall not entrench upon this critically important field of state action or impede the states in the pursuit of this evolution in social progress. The fundamental importance of the family as the basic unit of the social structure of our nation has long been recognized and clearly established. It certainly is not and should not be within the constitutional authority of the Federal Government to adopt or enforce legislation which will annul or invalidate in any manner whatsoever the legal effects of statutes of the states serving the purpose of social advancement in connection with a question of such vital domestic importance.

to be accomplished, the Treasury Department should try to persuade Congress to attempt to tax the separate property and estates of husbands and wives as a unit in all the states of the Union. Insofar as husbands and wives are concerned, such a law would be uniform in its application in every state of the Union. This procedure, however, would only remove one of the objections to the present vicious estate tax amendment, namely, that it arbitrarily and unfairly disregards the property rights of the community partnership property states and discriminates against these States in calculating the Federal Estate Tax. If such a suggestion were adopted, and the Federal Estate Tax Law attempted to impose a Federal Estate Tax based on all of the property of both husband and wife in every state in the Union, regardless of which spouse died first, such a law would still be arbitrary and unfair as a gross discrimination against married people in favor of single people and would, of course, be an arbitrary attempt to measure the tax of one person by the property of another. Until and unless the Federal Government is given and exercises power to regulate marital property and other local matters, any Federal Tax Act which does not recognize actual ownership, as fixed by state law, will be invalid.

AMICI CURIAE

The attorneys submitting and signing this *Amici Curiae* brief represent the following State Bar Associations and State Community Property Taxpayers' Committees all of which are interested in the outcome of this case:

Charles E. Dunbar, Jr. of New Orleans, representing the Louisiana State Bar Association and the Louisiana Community Property Taxpayers' Committee; R. N. Gresham of San Antonio, J. P. Jackson of Dallas, Palmer

Hutcheson of Houston and Harry C. Weeks of Fort Worth, representing the State Bar of Texas; George Donworth of Seattle, representing Washington State Bar Association and a committee of Community property taxpayers of the State of Washington; Joseph D. Brady of Los Angeles, Russell F. O'Hara of Vallejo, and Jerold E. Weil of San Francisco, representing State Bar of California; Blaine B. Shimmel of Phoenix, Samuel H. Morris of Globe, and Gerald Jones of Tucson, representing State Bar of Arizona; and Paul Hyatt of Lewiston, representing Idaho State Bar Commission.

IN CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Louisiana is correct and should be affirmed.

Respectfully submitted,

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APPENDIX

I.

FEDERAL STATUTES

Revenue Act of 1942

"Sec. 401. **Estates to which Amendments Applicable.** Except as otherwise expressly provided, the amendments made by this Part shall be applicable only with respect to estates of decedents dying after the date of the enactment of this Act."

"Sec. 402. **Community Interests.**

"(a) **Transfers of Community Property in Contemplation of Death, etc.**—Section 811 (d) (relating to revocable transfers) is amended by adding at the end thereof the following new paragraph:

'(5) Transfers of community property in contemplation of death, etc.—For the purposes of this subsection and subsection (c), a transfer of property held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.'

"(b) General Rule—Section 811 (e) (relating to joint interests) is amended as follows:

(1) By striking out '(e) Joint Interests.—' and inserting in lieu thereof

'(e) Joint and Community Interests.—

'(1) Joint interests.—'.

(2) By inserting at the end thereof the following new paragraph:

'(2) Community interests.—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possesion of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.' "

* * * * * *

"Sec. 404. **Proceeds of Life Insurance.**

"(a) General Rule.—Section 811 (g) (relating to life insurance) is amended to read as follows:

'(g) Proceeds of Life Insurance.—

'(1) **Receivable by the executor.**—To the extent of the amount receivable by the executor as insurance under policies **upon the life of the decedent.**

'(2) **Receivable by other beneficiaries.**—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in con-

junction with any other person. For the purposes of clause (A) of this paragraph, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purposes of clause (B) of this paragraph, the term 'incident of ownership' does not include a reversionary interest.

'(3) **Transfer not a gift.**—The amount receivable under a policy of insurance transferred, by assignment or otherwise, by the decedent shall not be includible under paragraph (2) (A) if the transfer did not constitute a gift, in whole or in part, under Chapter 4, or, in case the transfer was made at a time when Chapter 4 was not in effect, would not have constituted a gift, in whole or in part, under such chapter had it been in effect at such time.

'(4) **Community property.**—For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, except such part thereof as may have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term 'incidents of ownership' includes incidents of ownership possessed by the decedent at his death as manager of the community.'

"(b) **Liability of Life Insurance Beneficiaries.**—Section 826 (c) (relating to apportionment of liability of beneficiaries) is amended to read as follows:

'(c) **Liability of Life Insurance Beneficiaries. Unless the decedent directs otherwise in his will,** if any part of the gross estate **upon which tax has been paid** consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to **the sum** of the net estate **and the amount of the exemption allowed in computing the net estate, determined under section 935 (c).** If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.'

"(c) **Decedents to Which Amendments Applicable.**—The amendments made by subsection (a) shall be applicable only to estates of decedents dying after the date of the enactment of this Act; but in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy."

"Sec. 407 **Deduction on Account of Property Previously Taxed.**

"(a) **Amendments to Internal Revenue Code Provisions Relating to Property Previously Taxed.**—

"(1) The first paragraph of section 812 (c) is amended to read as follows:

'(c) **Property Previously Taxed.**—An amount equal to the value of any property (1)

forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. **Property includible in the gross estate of the prior decedent under section 811 (f) and property included in total gifts of the donor under section 1000 (c) received by the decedent described in this subsection shall, for the purposes of this subsection, be considered a bequest of such prior decedent or gift of such donor.** This deduction shall be allowed only where a gift tax imposed under Chapter 4, or under Title III of the Revenue Act of 1932, 47 Stat. 245, or an estate tax imposed under this **chapter** or any prior Act of Congress, was finally determined and paid by or on behalf of such donor, or the estate of such prior decedent, as the case may be, and only in the amount finally determined as the value of such property in determining the value of the gift, or the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate, and only if in determining the value of the net estate of the prior decedent no deduction was allowable under this **subsection, section 861 (a) (2), or the corresponding provisions of any prior Act of Congress,** in respect of the property or property given in exchange therefor.' "

"Sec. 411. **Liability of Certain Transferees.**

"(a) **Imposition of Liability.**—Section 827 (b) is amended to read as follows:

"(b) **Liability of Transferee, etc.**—If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under section 811 (b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property sold by such spouse, transferee, trustee, surviving tenant, person in possession of property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, to a *bona fide* purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien provided in section 827 (a) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, except any part sold to a *bona fide* purchaser for an adequate and full consideration in money or money's worth.'

"(b) **Definition of Transferee.**—Section 900 (e) is amended to read as follows:

"'(e) **Definition of 'Transferee'.**—As used in this section, the term 'transferee' includes heir, legatee, devisee, and distributee, **and includes a person who, under section 827 (b), is personally liable for any part of the tax.**' "

"Sec. 451. **Gifts to Which Amendments Applicable.** Except as otherwise expressly provided, the amendments made by this Part shall be applicable only with respect to gifts made in the calendar year 1943, and succeeding calendar years."

"Sec. 453. **Gifts of Community Property.** Section 1000 (relating to tax on gifts) is amended by

inserting at the end thereof the following new subsection:

'(d) **Community Property.**—All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife.' "

Internal Revenue Code:

"Sec. 810. **Rate of Tax.** A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title."

"Sec. 811. **Gross Estate.** The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States"—

"Sec. 811 (a) **Decedent's Interest.**—To the extent of the interest therein of the decedent at the time of his death;"

"Sec. 811(e)

"(e) **Joint Interests.**—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor,

except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: **Provided,** That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: **Provided further,** That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants."

"Sec. 812 **Net Estate.** For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—"

"Sec. 812 (b)

"(b) **Expenses, Losses, Indebtedness, and Taxes.**—Such amounts—

"(1) for funeral expenses,

"(2) for administration expenses,

"(3) for claims against the estate,

"(4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such

mortgage or indebtedness, is included in the value of the gross estate, and

"(5) reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent,

as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, * * * * * * * For the purposes of this section the term 'property subject to claims' means property includible in the gross estate of the decedent which, or the avails of which, would, under the applicable law, bear the burden of the payment of such deductions in the final adjustment and settlement of the estate; and, for the purposes of this definition, the value of the property shall be reduced by the amount of the deduction under the next sentence attributable to such property. * * * * * * *"

"Sec. 812 (c)

"(c) **Property Previously Taxed.** An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received."

"Sec. 826 (b)

"(b) **Reimbursement Out of Estate.** If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still

undistributed or by a just and equitable contribution by the persons whose interests in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

"Sec. 826 (c)

"(c) **Liability of Life Insurance Beneficiaries.** Unless the decedent directs otherwise in his will, if any part of the gross estate upon which tax has been paid consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to the sum of the net estate and the amount of the exemption allowed in computing the net estate, determined under section 935 (c). If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio."

"Sec. 113. **Adjusted Basis for Determining Gain or Loss.**

"(a) **Basis (Unadjusted) of Property.** The basis of property shall be the cost of such property; except that—

"(5) **Property Transmitted at Death.** If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition."

LOUISIANA STATUTES

Act 119 of the Legislature of Louisiana of 1932.

Estate Transfer Tax.

AN ACT

To obtain the benefit of credit allowed under the Federal Estate Tax Law by levying an Estate Transfer Tax in addition to the Inheritance Tax provided in Act 127 of 1921 as amended by Act 44 of 1922; and to provide for its collection.

All Estate.

Section 1. Be it enacted by the Legislature of the State of Louisiana, That there is hereby levied, in addition to the inheritance tax as now provided by Act 127 of 1921, as amended by Act 44 of 1922, an estate transfer tax upon all estates which are subject to taxation under the Federal Revenue Act of 1926.

Amount of Tax.

Section 2. Whenever the aggregate amount of all inheritance, succession, legacy and estate taxes actually paid to the several states of the United States in respect to any property owned by such decedent shall be less than eighty per cent (80%) of the estate tax payable to the United States under the provisions of the said Federal Revenue Act of 1926, but not otherwise, the difference between said amount and said eighty per cent (80%) shall be paid to the State of Louisiana.

Procedure.

Section 3. The provisions of Act 127 of 1921 as amended by Act 44 of 1922, insofar as applicable shall regulate the proceedings to fix the amount of the tax hereby levied and the manner in which same shall be collected.

Intent and Purpose.

Section 4. It is hereby declared to be the intent and purpose of this Act to obtain for this state the benefit of the credit allowed under the provisions of title III, section three hundred and one, sub-section (b), of the Federal Revenue Act of nineteen hundred twenty-six to the extent that this State may be entitled by the provisions of said Act, by imposing additional taxes, and the same shall be liberally construed to effect this purpose.

Provisions Applicable.

Section 5. The provisions of this Act shall apply to all estates not fully distributed and now in process of settlement, where the date of death was subsequent to February twenty-six nineteen hundred twenty-six; provided there is at the time this act goes into effect a sufficient amount still due the United States Government under said Federal Revenue Act of 1928 from which to make the deduction contemplated by Section 3 hereof.

Constitutionality.

Section 6. If any section or portion of this Act be finally held to be unconstitutional by a court of competent jurisdiction such decision shall not invalidate the portions unaffected thereby.

Approved by the Governor,
July 7, 1932.

A true copy:

E. A. CONWAY,
Secretary of State.

Louisiana Revised Civil Code, 1870:

Art. 2405. Community presumed on dissolution of marriage.—At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited.

Art. 2402. Property forming community—Personal injuries to wife.—This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; "provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws." (As amended, Act 1902, No. 68.)

Art. 2599. Retention of possession by vendee until price and expenses restored.—He may remain in possession of the thing sold until the seller has restored the price which he paid, together with his expenses.

Art. 2406. Dissolution of marriage—Division of community.—The effects which compose the partnership

or community of gains, are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has been thus brought in marriage, by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

Art. 2404. Husband master of community—Gratuituous and fraudulent conveyances.—The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance *inter vivos*, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactory proving the fraud. (As amended, Act 1926, No. 96).

Art. 2385. Wife failing to administer paraphernal property—Management by husband.—The paraphernal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband.

Art. 2386. Fruits of paraphernal property—Ownership.—When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property, whether natural, civil, or the result of labor, belong to the conjugal partnership, if there exists a community of gains. If there do not, each party enjoys, as he chooses, that which comes to his hands; but the fruits and revenues, which are existing at the dissolution of the marriage, belong to the owner of the things which produce them. (As amended, Acts 1871. No. 87.)

Art. 2399. Community of acquets and gains—Stipulation against required.—Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

Art. 2329. Alteration of agreement after marriage prohibited—Couples removing into state—Contracts.—Every matrimonial agreement can be altered by the husband and wife jointly before the celebration of marriage; but it can not be altered after the celebration. Provided that in the case of married couples removing to this State and settling therein from other States and countries after marriage, they shall have the right at any time within one year after the passage of this act, or a like period after such settlement in this State, to make a valid marriage contract, subject in all other respects to the laws of this State. (As amended, Act. 1910, No. 236.)

Art. 2325. Antenuptial contracts authorized—Restrictions.—In relation to property, the law only regulates the conjugal association, in default of particular agreements, which the parties are at liberty to stipulate as they please, provided they be not contrary to good morals, and under the modifications hereafter prescribed.

Art. 2392. Stipulation against marital partnership.—Married persons may stipulate that there shall be no partnership between them.

Art. 2807. The community of property, created by marriage is not a partnership; it is the effect of a contract governed by rules prescribed for that purpose in this Code."